



**Office of the Assistant Secretary of Defense
(Health Affairs)
TRICARE Management Activity
Acquisition Management and Support**

TRICARE ACQUISITION PRACTICE (TAP)

**TAP 33-02, Rev. 000
17 January 2003**

SUBJECT: AGENCY LEVEL PROTESTS

Reference: FAR 33.103 – Protests to the agency.
TAM 33.103 - Protests to the agency.

1. PURPOSE:

To establish responsibilities and procedures for agency level protests to ensure a fair and impartial agency decision.

2. APPLICABILITY:

This TAP applies to all TMA agency level protests.

3. DEFINITIONS:

3.1. FAR 33.101 defines “protest” as a written objection by an interested party to any of the following:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of a contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

3.2. “Filed” means the complete receipt of any document by an agency before its close of business.

3.3. The Independent Review Official (IRO) is an individual who provides an independent review of a protest at a level above the contracting officer.

TRICARE ACQUISITION PRACTICE (TAP)

TAP 33-02, Rev. 000
17 January 2003

4. RESPONSIBILITIES:

4.1. The contracting officer is responsible for documenting receipt of an agency level protest, considering the protest's merits, and making his/her best effort to resolve the protest within 35 days after the protest is filed (see paragraph 5.1.1) with the contracting officer.

4.2. The Head of the Contracting Activity (HCA) is responsible for appointing an IRO when an interested party requests an independent review of the protest at a level above the contracting officer (see paragraph 5.3.2.2.).

4.3. The IRO is responsible for documenting receipt of a request for independent review of an agency level protest, considering the protest's merits, and making the decision. The IRO will make every effort to resolve the protest within 35 days after a protest with a request for independent review is filed (see paragraph 5.1.1).

4.4. The Office of General Counsel (OGC) is responsible for providing legal research and advice to the contracting officer or IRO. The OGC is also responsible to review a protest decision in accordance with TAM 1.601-90(b)(5) in a manner that supports TMA's efforts to resolve the protest within 35 days after the protest is filed (see paragraph 5.1.1.).

5. PROCEDURES:

5. General.

5.1.1. A protestor has specific options to file an agency level protest. Any of these options may be exercised either before or after award.

1) A protestor may submit an agency level protest to be resolved by the contracting officer (see paragraph 5.2).

2) A protestor may request an independent review of a protest at a level above the contracting officer

a) In lieu of submitting a protest to the contracting officer; or

b) As an appeal of a contracting officer's decision on a protest (see paragraph 5.3).

5.1.2. An agency level protest shall be processed in accordance with FAR 33.1, TAM 33.103, and this TAP. Where appropriate, the individual processing the protest shall consider the rules and prior decisions of the Comptroller General when deciding an agency level protest. (See <http://www.gao.gov/decisions/decision.htm> or http://www.access.gpo.gov/su_docs/aces/aces170.shtml for Comp Gen decisions.)

TRICARE ACQUISITION PRACTICE (TAP)

TAP 33-02, Rev. 000
17 January 2003

5.1.3. A protest that does not clearly request an independent review will be presumed to be a protest to be resolved by the contracting officer responsible for the solicitation being protested.

5.1.4. The contracting officer shall process protests regarding small business or small disadvantaged business representation of an offeror in accordance with FAR 19.302, 19.305, 19.703(a), or 19.703(b). TMA does not allow an independent review of a small business representation protest.

5.2. Protests Filed with the Contracting Officer.

5.2.1. All agency level protests will be referred to the TMA contracting officer responsible for the solicitation being protested.

5.2.2. If a protest is received before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing to be in the best interest of the Government.

5.2.2.1. Upon receipt of an agency level protest, the contracting officer will:

5.2.2.1.1. Acknowledge receipt of the agency level protest via letter to the protestor.

5.2.2.1.2. Review the protest to ensure it is submitted within the timeframes allowed by FAR 33.103(e).

5.2.2.1.3. Review the protest to ensure it contains the information required by FAR 33.103(d)(2). If the protest contains the required information, the contracting officer shall immediately contact the protester to ensure the protest basis is fully understood. If the protest does not contain the required information, the contracting officer shall request the missing information from the protestor. The request should note that failure to provide such information could lead to dismissal of the protest.

5.2.2.2. If the contracting officer decides to dismiss the protest based on failure to submit the protest timely and/or non-compliance with FAR 33.103(d)(2), he/she will coordinate with the HCA and OGC before preparing the protest decision.

5.2.2.3. The contracting officer will meet with the HCA, the Chief, Contract Management Division (CMD), and OGC to review the protest and establish a protest response timeline.

TRICARE ACQUISITION PRACTICE (TAP)

TAP 33-02, Rev. 000
17 January 2003

5.2.2.4. The contracting officer shall prepare a timeline that identifies the steps required to process the protest response.

5.2.2.5. The contracting officer shall review the protest and any relevant information and coordinate the decision to sustain or deny the protest. Upon reaching that conclusion, the contracting officer will coordinate the decision whether award will be made or award will be withheld pending resolution of the protest.

5.2.2.5.1. If an award will be made, the contracting officer shall:

5.2.2.5.1.1. Coordinate with the project officer/project manager to either justify the urgent and compelling reasons for award or determine that award is in the best interest of the Government.

5.2.2.5.1.2. Prepare either a written justification explaining the urgent and compelling reasons for award or a written determination explaining why the award is in the best interest of the Government. The document should include factual findings and a detailed analysis sufficient to support the conclusion asserted.

5.2.2.5.1.3. Submit the document through the Chief, CMD to the HCA for approval.

5.2.2.5.2. If award will be withheld pending resolution of the protest, the contracting officer shall notify each offeror of the existence of the protest. If additional time is required, the contracting officer shall request each offeror extend its proposal acceptance date.

5.2.2.6. The contracting officer shall prepare an agency protest decision that is well-reasoned and explains the agency position. The contracting officer shall coordinate the decision with the HCA and the Chief, CMD. The contracting officer will submit the decision to OGC for review.

5.2.2.7. The contracting officer shall sign the agency protest decision and ensure it is forwarded to the protestor in a manner that provides evidence of receipt, e.g., certified mail, return receipt requested.

5.2.2.8. The contracting officer will ensure a copy of the agency protest decision is distributed to the HCA, Chief, CMD, OGC, and the contract file.

TRICARE ACQUISITION PRACTICE (TAP)

TAP 33-02, Rev. 000
17 January 2003

5.2.3. If a protest is received within 10 days after contract award or within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with FAR 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government.

5.2.3.1. To process a protest after award, the contracting officer will follow the steps outlined under paragraph 5.2.2.1. through paragraph 5.2.2.4. above, then proceed with the steps outlined below.

5.2.3.2. The contracting officer shall review the protest and any relevant information and coordinate the decision whether contract performance will be suspended or contract performance will continue.

5.2.3.2.1. If performance will be suspended, the contracting officer will immediately direct the contractor to suspend performance until further notification.

5.2.3.2.2. If contract performance will continue, the contracting officer shall:

5.2.3.2.2.1. Coordinate with the project officer/project manager to either justify the urgent and compelling reasons for continued contract performance or determine that continued contract performance is in the best interest of the Government.

5.2.3.2.2.2. Prepare either a written justification explaining the urgent and compelling reasons for continued contract performance or a written determination explaining why continued contract performance is in the best interest of the Government. The document should include factual findings and a detailed analysis sufficient to support the conclusion asserted.

5.2.3.2.2.3. Submit the document through the Chief, CMD to the HCA for approval.

5.2.3.3. To complete processing a protest after award, the contracting officer will follow the steps outlined under paragraph 5.2.2.6. through 5.2.2.8. above.

TRICARE ACQUISITION PRACTICE (TAP)

**TAP 33-02, Rev. 000
17 January 2003**

5.3. Protests Requesting an Independent Review.

5.3.1. All requests for an independent review of a protest at a level above the contracting officer will be referred to the Chief, CMD.

5.3.2. Upon receipt of a protest before award with a request for independent review:

5.3.2.1. The Chief, CMD, will meet with the HCA and OGC to review the request, discuss strategy, and determine the appropriate individual to serve as IRO. The IRO shall be at a level above the contracting officer. The IRO shall not have previous personal involvement with the acquisition, i.e., the IRO shall not be the contracting officer, the contracting officer's supervisor, the Source Selection Authority, or a member of the source selection organization.

5.3.2.2. The HCA will appoint the IRO using the template at Enclosure 1.

5.3.2.3. The IRO will meet with the HCA, the Chief, CMD, and OGC to discuss the IRO's responsibilities, review the request for independent review and establish a review response timeline.

5.3.2.4. The IRO shall prepare a timeline that identifies the steps required to process the request for independent review.

5.3.2.5. The IRO will acknowledge receipt of the request for independent review via letter to the protestor.

5.3.2.6. The IRO shall review the protest to ensure it is submitted within the timeframes allowed by FAR 33.103(e).

5.3.2.7. The IRO shall review the protest to ensure it contains the information required by FAR 33.103(d)(2). If the protest contains the required information, the IRO shall contact the protestor to ensure the protest basis is fully understood. If the protest does not contain the required information, the IRO shall request the missing information from the protestor. The request should note that failure to provide such information could lead to dismissal of the protest.

5.3.2.8. If the IRO recommends dismissing the protest based on failure to submit the protest timely and/or non-compliance with FAR 33.103(d)(2), the IRO will coordinate with the HCA, Chief, CMD, and OGC before preparing the agency protest decision.

5.3.2.9. The IRO shall review the protest and any relevant information and decide whether to sustain or deny the protest. Upon reaching that conclusion, the IRO will

TRICARE ACQUISITION PRACTICE (TAP)

**TAP 33-02, Rev. 000
17 January 2003**

then decide whether he/she will recommend award be made or recommend award be withheld pending resolution of the protest. The IRO shall coordinate the protest decision and his/her recommendation with the Chief, CMD, the HCA, OGC, and the contracting officer to ensure all parties concur in the proposed course of action.

5.3.2.9.1. If the IRO recommends an award be made, the contracting officer shall:

5.3.2.9.1.1. Coordinate with the project officer/project manager to either justify the urgent and compelling reasons for award or determine that award is in the best interest of the Government.

5.3.2.9.1.2. Prepare either a written justification explaining the urgent and compelling reasons for award or a written determination explaining why the award is in the best interest of the Government. The document should include factual findings and a detailed analysis sufficient to support the conclusion asserted.

5.3.2.9.1.3. Submit the document through the Chief, CMD to the HCA for approval.

5.3.2.9.2. If the IRO recommends award should be withheld pending resolution of the protest, the contracting officer shall notify each offeror of the existence of the protest. If additional time is required, the contracting officer shall request each offeror extend its proposal acceptance date.

5.3.2.10. The IRO shall prepare an agency protest decision that is well-reasoned and explains the agency position. The IRO shall coordinate the decision with the HCA and the Chief, CMD. The IRO will submit the decision to OGC for review.

5.3.2.11. The IRO shall sign the protest decision and ensure it is forwarded to the protestor in a manner that provides evidence of receipt, e.g., certified mail, return receipt requested.

5.3.2.12. The IRO shall ensure that a copy of the protest decision is distributed to the HCA, the Chief, CMD, the contracting officer, and OGC.

5.3.2.13. The contracting officer shall ensure a copy of the IRO's decision is placed in the contract file.

TRICARE ACQUISITION PRACTICE (TAP)

TAP 33-02, Rev. 000
17 January 2003

5.3.3. Upon receipt of a protest after award with a request for independent review:

5.3.3.1. The IRO will follow the steps outlined under paragraph 5.3.2.3. through paragraph 5.3.2.8. above, then proceed with the steps outlined below.

5.3.3.2. The IRO shall review the protest and any relevant information and decide whether to sustain or deny the protest. Upon reaching that conclusion, the IRO will then decide whether he/she will recommend suspension of contract performance or continuation of contract performance. The IRO shall coordinate the protest decision and his/her recommendation with the Chief, CMD, the HCA, OGC, and the contracting officer to ensure all parties concur in the proposed course of action.

5.3.3.2.1. If the IRO recommends suspension of contract performance, the contracting officer shall immediately direct the contractor (successful offeror) to suspend performance until further notification.

5.3.3.2.2. If the IRO recommends continuation of contract performance, the contracting officer shall

5.3.3.2.2.1. Coordinate with the project officer/project manager to either justify the urgent and compelling reasons for continued contract performance or determine that continued contract performance is in the best interest of the Government.

5.3.3.2.2.2. Prepare either a written justification explaining the urgent and compelling reasons for continued contract performance or a written determination explaining why continued contract performance is in the best interest of the Government. The document should include factual findings and a detailed analysis sufficient to support the conclusion asserted.

5.3.3.2.2.3. Submit the document through the Chief, CMD to the HCA for approval.

5.3.3.3. To complete processing a protest after award, the IRO will follow the steps outlined under paragraph 5.3.2.10. through paragraph 5.3.2.13 above.



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TRICARE ACQUISITION PRACTICE (TAP)

TAP 33-02, Rev. 000
17 January 2003

ENCLOSURES

1. Appointment Letter – Independent Review Official (IRO) (Sample) (1 page)